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U.S. Citizenship
and Immigration
Services

D2

FILE: WAC 03 149 54429 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2005

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a care facility for the elderly, with six locations and 12 employees. It seeks to hire the beneficiary as an accounts manager. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation. On appeal, counsel submits a brief.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) two requests for evidence, dated August 21, 2003 and November 7, 2003; (3) counsel's responses to these requests; (3) the director's denial letter; and (4) Form I-290B, with attached brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner states that it is seeking the beneficiary's services as an accounts manager. Evidence of the beneficiary's duties includes: the Form I-129, with a March 27, 2003 support letter from the petitioner; and counsel's October 16, 2003 response to the director's first request for evidence.

In his October 16, 2003 response to the director, counsel provided a detailed description of the duties of the proffered position. Specifically, the position will require the beneficiary to:

- Research and evaluate existing markets for possible new residential care homes and perform industry competitor analysis for elder care facilities;
- Identify prospective markets and develop strategies to maximize the penetration of the residential care business throughout the Mesa and Gilbert, Arizona areas;
- Oversee developments or monitor trends that indicate the need for new services;
- Analyze statistics to determine potential requirements and monitor patient/client/customer preferences;
- Implement strategies decided upon by management;
- Develop strategies decided upon by management; and
- Develop strategic partnerships and develop a work plan to conduct planning assignments.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so

complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In his denial, the director found the duties of the proffered position to correspond to those of advertising, marketing, promotions, public relations, and sales managers, as described in the 2002-2003 edition of the *Handbook*. He further concluded that the position failed to qualify as a specialty occupation under any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), noting that the occupation did not impose a baccalaureate or higher degree, or its equivalent, as a minimum requirement for entry into the profession nor require a degree in a specific specialty. Following its own review of the 2004-2005 edition of the *Handbook*, the AAO also concludes that the duties of the proffered position are closely aligned to those of a marketing manager under the occupation of advertising, marketing, promotions, public relations, and sales managers. Further, like the director, the AAO finds that the *Handbook* does not indicate that the occupation imposes a baccalaureate or higher degree requirement:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business, law, economics, accounting, finance, mathematics, and statistics are advantageous.....

At the time of his October 16, 2003 response to the director's request for evidence, counsel referenced the Department of Labor's *Occupational Information Network (O*Net)* discussion of marketing manager which gives this occupation a job zone rating of four. On appeal, counsel again quotes from the *O*Net*, stating that the proffered position of accounts manager requires a four-year bachelor's degree. However, the *O*Net* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Further, a job zone rating of four does not indicate that a bachelor's degree in a specific specialty is required.

On appeal, counsel also notes that the petitioner has clearly stated the minimum educational requirements for its position and that, in its support letter of March 27, 2003, it specified that the duties of the position required someone with a bachelor's degree in a business discipline, or related management or marketing area. However, while the petitioner has stated its desires regarding the proffered position, it is not the petitioner that dictates the requirements that will satisfy the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree.

The *Handbook*, however, clearly indicates there is no minimal educational requirement of a bachelor's or higher degree for the occupation of marketing manager. Instead, it states only that many employers prefer candidates with experience in related occupations and a broad liberal arts background. As a result, the AAO concludes that the proffered position does not qualify as a specialty occupation under the first criterion – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To determine whether the petitioner can establish that its position meets the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – the AAO has considered the statements of counsel made in his October 16, 2003 response to the director's request for evidence and on appeal. The job listings for account manager positions referenced by counsel on appeal are not included in the record before the AAO. However, as counsel characterizes them as representing employment opportunities in businesses that are larger than that of the petitioner, the AAO concludes these announcements, even if available, would not be responsive to the requirements imposed by the second criterion.

In his response to the director's request for evidence that a degree requirement is an industry norm, counsel asserted that it is standard for any industry that employs accounts managers to require a bachelor's degree or its equivalent for such positions. He further contended that the petitioner's burden is to establish that a degree is a prerequisite for entry into a profession, not that it is required by a particular industry or size of business, and cited the findings of *Matter of General Atomic Company*, 17 I&N Dec. 532 (Comm. 1980) and *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) in support of his position.

The AAO does not find counsel's interpretation of the second criterion's requirements to be persuasive. The findings in *Matter of General Atomic Company* focused on whether an individual with an undergraduate degree in civil engineering qualified as a person of distinguished merit and ability. In *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989), the court concluded that the former Immigration and Naturalization Service (INS) had failed to consider the specific responsibilities of a graphic designer position and, therefore, erred in determining that the position did not require a professional. Neither case addresses the requirements of the criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A)(2) that allows a petitioner to establish a position as a specialty occupation by providing evidence that a specific degree requirement is an industry norm. Despite counsel's assertions, a petitioner seeking to qualify its position as a specialty occupation under the second criterion must establish that a degree requirement is common to its industry, specifically in parallel positions among similar organizations. CIS' reliance on the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)

to evaluate whether a position qualifies as a specialty occupation is confirmed by the findings of *Shanti v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In light of counsel's statements that the job announcements submitted in response to the director's request for evidence do not come from similarly-sized companies and in the absence of any other evidence that would establish a degree requirement within the petitioner's industry, the AAO finds that the petitioner has failed to establish that its position qualifies as a specialty occupation under the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, counsel, in his October 16, 2003 response to the director's request for evidence, stated that the proffered position was new and, therefore, the petitioner could not document its past practices regarding its employment of accounts managers. Lacking any evidence that the petitioner normally requires a degree or its equivalent for the proffered position, the AAO finds that the position cannot qualify as a specialty occupation under the third criterion.

The fourth criterion requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has reviewed the duties of the proffered position, as described by the petitioner in its September 27, 2003 letter and by counsel in his October 16, 2003 response to the director. Counsel's statements on appeal concerning the complexity of the proffered position have also been considered.

The petitioner's position has already been determined to be that of a marketing manager, an occupation that does not normally impose any specific minimal educational requirement for employment. In response to the director's request for evidence, counsel asserted that the duties of the petitioner's position should be considered specialized and complex, as they required the employee to conduct research, compile data and then advise the petitioner as to distribution and desirability of its services. Counsel also stated that to perform the position's duties, the incumbent needed skills in communication, public relations, and marketing, and that, as a result, the position required knowledge usually associated with a bachelor's degree or its equivalent.

On appeal, counsel asserts that the director erred in determining that the position's duties were not complex, citing *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D.Cal. 1989) to support his statement that the duties of a position, not the size of a petitioner's business, should determine whether a position qualifies as a specialty occupation. Counsel's concerns do not, however, appear relevant to the director's evaluation of the

fourth criterion as the director's denial focused specifically on the duties of the proffered position and made no reference to the size of the petitioner's business. Counsel also contends that the duties of the petitioner's position are professional in nature and require the incumbent to work independently, imposing a high level of responsibility. He further states that the individuals with whom the beneficiary would work hold a range of degrees and that, as the position includes the oversight and coordination of employees with bachelor's degrees, it must be held by someone with a bachelor's degree.

The supervisory duties described by counsel in support of the petitioner's degree requirement have not been previously identified and represent a material change to those previously described by the petitioner and counsel. In fact, counsel's October 16, 2003 response to the director specifically stated that the duties of the proffered position would not involve the supervision of other employees as the work would be "mainly independent work combined with client contact and assisting and/or reporting to management." As a result, the AAO will not consider these additional responsibilities in assessing whether the duties of the proffered position are so specialized and complex that they are usually associated with the attainment of a baccalaureate or higher degree. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

A review of the specific duties described by the petitioner in its March 27, 2003 support letter and, in greater detail, by counsel in his October 16, 2003, response to the director's request for evidence does not lead the AAO to conclude that they are different than those normally associated with the occupation of marketing manager, as described in the *Handbook*. As the proffered position's duties do not involve greater specialization and complexity than those of a marketing manager, a job that does not normally qualify as a specialty occupation, the AAO concludes that the petitioner has failed to meet the requirements of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.